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E-FILED: 4/22/10

7 UNITED STATES BANKRUPTCY COURT

8 DISTRICT OF NEVADA

9 In Re: ) Case No. BKS-09-34502-BAM  
10 ) Chapter 13  
11 )  
JOSEPH DUFOUR ) Hearing Date: 5/27/10  
JULIE DUFOUR ) Hearing Time: 3:00 PM  
12 Debtor(s). )  
13 ) Trustee: Rick Yarnall  
14 )  
15 )

16 AMENDED MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF  
17 FIRST TENNESSEE BANK PURSUANT TO 11 U.S.C. §506(a) AND §1322

18 Debtor, JOSEPH DUFOUR and JULIE DUFOUR, by and through attorney Jeremy  
19 Mondejar, Esq. of the Law Offices of Barry Levinson, hereby move this Court for its Order  
20 valuing collateral and modifying the rights of Creditor FIRST TENNESSEE BANK pursuant to  
21 11 U.S.C. §506(a), and §1322, and Bankruptcy Rules 3012 and 9014. In furtherance of this  
22 motion, Debtor states as follows:

- 23 1. Debtor filed the above captioned Chapter 13, Case Number 09-34502-BAM on  
24 December 31, 2009.
- 25 2. On the petition date, Debtor owned real property located at 5841 Ivy Vine Ct., Las  
26 Vegas, Nevada 89141, legally described as:  
27 LOT 28 Block A of SETONA UNIT #2 AT SOUTHERN HIGHLANDS PLAT BOOK  
28 100 PAGE 68

APN 176-36-213-019, (hereinafter the "Property").

3. The value of the Property was \$348,500.00 as of the petition date. See ZILLOW Appraisal attached hereto as Exhibit "A".
4. As of the petition date, the Property was encumbered by a First Trust Deed in favor of BAC HOME LOANS SERVICING securing a note with a principal balance of \$394,473.00.
5. As of the petition date, no equity existed in the Property above the claim of
6. BAC HOME LOANS SERVICING with respect to the First Trust Deed.
7. FIRST TENNESSEE BANK holds a Second Trust Deed securing a note with a principal balance of \$64,845.00. The Second Trust Deeds were wholly unsecured on the petition date and if the Property were to be sold at auction, FIRST TENNESSEE BANK would receive nothing with respect to the Second Trust Deed.
8. The Debtor therefore takes the position that FIRST TENNESSEE BANK'S note secured by Second Trust Deed is unsecured and should be reclassified as a general unsecured claim to receive pro rata with other general unsecured creditors through the Debtors' Chapter 13 Plan.

### **LEGAL ARGUMENT**

In *In re Zimmer*, 313 F.3d 1220 (9<sup>th</sup> Cir. 2002), the Court stated that a wholly unsecured lien holder's claim can be modified and reclassified as a general unsecured claim pursuant to 11 U.S.C. §506(a), despite the anti-modification language in §1322(b)(2). Specifically, the Court held:

Section 506(a) divides creditors' claims into "secured...claims" and "unsecured claims." Although the conventional interpretation of "secured" might include any claim in which the creditor has a security interest in the debtor's property, § 506(a) makes clear that the status of a claim depends on the valuation of the property. An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim ...

To put it more simply, a claim such as a mortgage is not a "secured claim" to the extent that it exceeds the value of the property that secures it. Under the Bankruptcy Code, "secured claim" is thus a term of art; not every claim that is secured by a lien on property will be considered a "secured claim." Here, it is plain that PSB Lending's claim for the repayment of its loan is an unsecured claim, because its deed of trust is junior to the first deed of trust, and the value of the loan secured by the first deed of trust is greater than the value of the house.

Since FIRST TENNESSEE BANK Trust Deed is wholly unsecured (in that there is no equity above the first mortgage in the Property), this Court should reclassify FIRST TENNESSEE BANK second mortgage claims to a general unsecured claim to be receive pro rata with like unsecured creditors. FIRST TENNESSEE BANK should also be stripped of its secured rights under State law and the recorded Second Trust Deed should be expunged from the county records to give effect to this Court's order.

Moreover, Debtor may bring a motion to "strip off" FIRST TENNESSEE BANK Second Trust Deed are not required to file an adversary proceeding. See *In re Williams*, 166 B.R. 615 (Bankr.E.D.Va.1994), *In re Fuller*, 255 B.R. 300 (Bankr.W.D.Mich.2000), *In re Hoskins*, 262 B.R. 693 (Bankr.E.D.Mich.2001), *In re King*, 290 B.R. 641 (Bankr.C.D.Ill.2003), *In re Millspaugh*, 302 B.R. 90 (Bankr.D.Idaho 2003), *Dickey v. Ben. Fin. (In re Dickey)* 293 B.R. 360 (Bankr.M.D.Pa.2003), *In re Hill*, 304 B.R. 800 (Bankr.S.D.Ohio 2003); *In re Sadala* 294 B.R. 180 (Bankr.M.D.Fla.2003), *In re Fisher*, 289 B.R. 544 (Bankr.W.D.N.Y.2003), *In re Robert*, 313 B.R. 545 (Bankr.N.D.N.Y.2004), *In re Bennett*, 312 B.R. 843 (Bankr.W.D.Ky.2004).

WHEREFORE, Debtor prays that this Court:

1. Find that FIRST TENNESSEE BANK is not a holder of a lien on the Property with respect to the Second Trust Deed or Third Trust Deed.
2. Immediately avoid, "Strip off", extinguish and expunge from the County Recorder FIRST TENNESSEE BANK wholly unsecured Second Trust Deed from the Property pursuant to 11 U.S.C. Section 506(a);

1           3.       Reclassify FIRST TENNESSEE BANK claim as a general unsecured claim to be  
2 paid pro rata with other general unsecured creditors through the Debtor's chapter 13 plan;

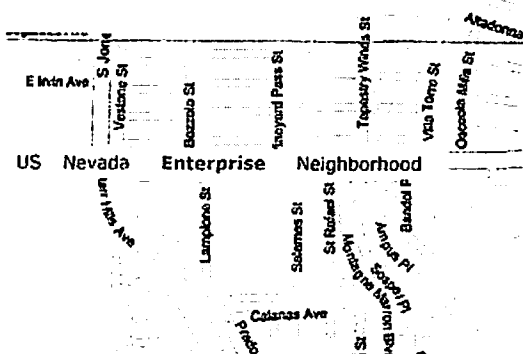
3           4.       Such other relief the Court finds appropriate.

4           Dated: April 22, 2010

5  
6                               /s/ Jeremy Mondejar, Esq.  
7                               JEREMY MONDEJAR, ESQ.  
8                               Attorney for Debtor(s)  
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# EXHIBIT A



Views: 15

Value Range: \$289K - \$411K

Monthly payment:

**\$1,761**

Check your 2010 Credit Score

Property type:	Single Family
Bedrooms:	5
Bathrooms:	3
Sqft:	2,355
Lot size:	6,098 sq ft / 0.14 acres
Year built:	2002
Parking type:	--
Cooling system:	--
Heating system:	--
Fireplace:	Yes
Last sold:	November 04 2002
MLS number:	

**Description**

This 2355 square foot single family home has 5 bedrooms and 3.0 bathrooms. It is located at 5841 Ivy Vine Ct Las Vegas, Nevada. This home is in the Clark School District. The nearest schools are Frias, Charles and Phyllis Elementary School, Charles Silvestri Junior High School and Liberty High School.

[Show all](#)

Post for sale/rent

Post for sale

Post for rent

Set a Make Me Move price

Save

Save as favorite

**Notes (private & optional)**

Share

E-mail to a friend

Share on Facebook

Alerts

Get price/status updates

Get home value report

Get new listings

Edit

Edit home facts

Edit home description

Add/edit photos

Claim your home

[Map](#)**Charts and Data**

	Value	Range	30-day change	Last updated
Zestimate®	\$348,500	\$289K - \$411K	-\$11,000	04/21/2010
My estimate	Create estimate			
Owner Comment	Post a comment			

	Zestimate is : posted on I think the Zestimate is: <input checked="" type="radio"/> Too Low <input type="radio"/> About Right <input type="radio"/> Too High My opinion (note that this comment will be public) <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
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**Show**☒ Zestimate (\$)☐ Listing price☐ Tax assessment☐ Tax paid☐ Page views**Time period**☐ 1 month☐ 1 year☒ 5 years☐ 10 years

Compare 89141 to nearby areas

**Price History**

Date	Description	Price	% Chg	Source	
11/04/2002	Sold	\$268,950	--	Public Record	

**Maps and Views****Show**☒ Zestimates☐ Schools☐ Grocery Stores☐ Coffee and Bakery☐ Parks☐ Restaurants☐ Gas Stations**Walk Score™**

22 - Car-Dependent

**Drive time**

Estimated address...

Distance: --

View home on larger map  
Local amenities provided by Google

Financing

Monthly Payment

Purchase price  
\$348,500

Down Payment  
\$69,700 20%  
☐

Estimate taxes & ins.

Program	Current Rate	Payment
30 Year Fixed	4.94% Avg.	\$1,486 /month
15 Year Fixed	4.31% Avg.	\$2,106 /month
5/1 ARM	3.64% Avg.	\$1,274 /month

Shop around & save money  
Save \$15,480  
Lowering rate .25% you save \$43/mo  
Higher Rate: 5.19%  
Avg Rate on Zillow: 4.94%  
Savings: \$15,480  
\$550,440  
\$534,960

ING DIRECT Mortgages: EZ online app



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